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rehearing after considering the petitions and briefs not only of respondent but of amici curiae including attorneys representing "extensive holdings in special improvement assessments and bonds representing them" as well as the city attorneys of twelve California cities, all of whom opposed the rule laid down. And in *Barber Asphalt Paving Company v. Armstrong*[26] the District Court of Appeal relied upon the former case and a hearing by the Supreme Court was refused. Thus the rule seems to be that in proceedings to enforce street assessment liens, the last lien in point of time imposed, and sought to be enforced, is superior and paramount to all such other liens.[27] *R. V.*

PARTNERSHIP: INEFFECTIVENESS OF STIPULATION NOT TO BE PARTNERS, WHEN PARTNERSHIP IN FACT EXISTS—Can parties stipulate in an agreement that they shall not be partners, although by the self-same agreement they arrange for the contribution of labor, funds, and equipment to a common enterprise, and provide for the distribution of the profits? The decision in the case of *Streeter and Riddell v. Bacon*[1] affirms the rule that such a stipulation is of no avail to enable any of the parties to escape liability, if from the undisputed facts in the case a partnership can be deduced as a legal conclusion.

In this case, Bacon, the appellant, entered into a written contract with his son and one James, the latter two proposing to enter into the business of threshing beans, and the appellant agreeing to furnish them with certain equipment. The agreement provided that the appellant should be repaid by the others all the funds advanced by him, out of the gross receipts of the business, and that at the end of the season, after this charge and all other bills had been met, the net balance remaining should be divided by James and the appellant equally. There was further a written stipulation in very specific terms embodied in the agreement, stating that the parties were not thereby binding themselves as partners; that none of them would be liable to or for the others, on account of any obligations entered into, whether for joint benefit or not.

The plaintiff in the present action gave credit to James and the

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[26] Supra, n. 1.

[27] Since each case must be determined by an interpretation of the statutes applicable, decisions from other jurisdictions are of little assistance here. Some jurisdictions have adopted the rule now laid down by our courts. Morey v. Duluth (1899) 75 Minn. 221, 77 N. W. 829; Jaicks v. Oppenheimer (1915) 264 Mo. 693, 175 S. W. 972. Other jurisdictions hold that the earlier of two street assessment liens should prevail. Philadelphia v. Meager (1871) 67 Pa. St. 345; Des Moines Brick Mfg. Co. v. Smith (1899) 108 Iowa 307, 79 N. W. 77; Bell v. New York (1901) 66 App. Div. 578, 73 N. Y. Supp. 298; Brownell Improvement Co. v. Nixon (1910) 48 Ind. App. 195, 92 N. E. 693, overruling Burke v. Lukens (1895) 12 Ind. App. 648, 40 N. E. 641, 54 Am. St. Rep. 539; Scott-McClure Land Co. v. Portland, supra, n. 17.

[1] (Sept. 20, 1920) 33 Cal. App. Dec. 197.

younger Bacon, after the president of the plaintiff company had read the agreement and been assured by the appellant that he, Bacon, would "back the boys up." The account was unpaid at the end of the season, and all of the parties to the agreement were sued, the appellant as a co-partner of the others. He was held liable for the full amount of the debt.

This case clearly follows the modern test as to partnership existence. The older test of partnership, announced in England in 1775,[2] and again in 1793[3] was simply that of sharing of profits. But with the development of business, in the first half of the last century, this test of partnership existence became very unsatisfactory, and was finally abandoned definitely in 1860.[4] Unfortunately, before this modification had become firmly established as the ruling doctrine, the courts in a few jurisdictions (particularly New York) had adopted the rule of the earlier cases,[5] and have continued to be guided by it.

The modern test of the existence of a partnership may be said to lie in the intentions of the parties alleged to be partners, as this intention is found from their acts in connection with the joint enterprise, and from any written agreements into which they have entered in connection with it.[6] This is the test which rules in California,[7] where it appears in the Civil Code.[8] It is announced in almost identical words in the Uniform Partnership Act.[9]

But the intention of the parties is not limited to any one of the clauses of the agreement upon which their association is based, nor, indeed, by the agreement itself. Not only their language, but their acts, are to be considered. If it appears from all of these that the intention of the parties is "to associate themselves for the purpose of doing business together and sharing the profits,[10]" then any declar-

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[2] Grace v. Smith (1775) 2 W. Bl. 998, 96 Eng. Rep. R. 587.

[3] Waugh v. Carver (1793) 2 H. Bl. 235, 126 Eng. Rep. R. 525.

[4] Cox v. Hickman (1860) L. R. 8 H. L. Cas. 268.

[5] Leggett et al. v. Hyde (1874) 58 N. Y. 272, 17 Am. Rep. 244; followed in Texas in Cleveland v. Anderson (1884) 2 Will. (Tex. App. Ct.) 139; and in Michigan, Dutcher v. Buck (1893) 96 Mich. 160, 55 N. W. 677, 20 L. R. A. 776. See also: Parker v. Canfield (1870) 37 Conn. 250, 9 Am. Rep. 317; Wessels v. Weiss (1895) 166 Pa. 490, 31 Atl. 247; Brandon v. Connor (1903) 117 Ga. 759, 45 S. E. 371, 63 L. R. A. 260.

[6] Burdick on Partnership (3d. ed.) p. 62; 1 Lindley on Partnership (2d ed.) p. 15; and cases cited.

[7] Niroad v. Farnell (1909) 11 Cal. App. 767, 106 Pac. 252; Quinn v. Quinn (1889) 81 Cal. 14, 22 Pac. 264; Chapin v. Brown (1894) 101 Cal. 500, 35 Pac. 1051; Coward v. Clanton (1898) 122 Cal. 451, 55 Pac. 147.

[8] Cal. Civ. Code, § 2395.

[9] Uniform Partnership Act, § 6, now law in Alaska (1917), Illinois, (1917), Maryland (1916), Michigan (1917), New York (1919), Pennsylvania (1915), Tennessee (1917), Virginia (1918), Wisconsin (1915), and Wyoming (1917).

[10] Cal. Civ. Code, § 2395; see also Chapman v. Hughes (1894) 104 Cal. 302, 37 Pac. 1048.

ation of the parties that they are not partners, or that their relation is of some other kind, is ineffectual.[11]

The actual existence of a partnership is thus seen to be "a deduction of law from the facts";[12] and if the facts are undisputed, and the partnership is a clear and necessary legal deduction therefrom, the mere understanding of the parties that one or more of them is not liable as a partner, is mistaken, and will not be given legal effect.[13]

In the principal case, does the fact that the president of the plaintiff corporation read the agreement, including the clause stipulating against a partnership, and afterward gave credit to the two younger men, justify the implication of an agreement on his part not to sue the defendant as a joint debtor? The fact that the defendant afterward assured the plaintiff's president that he would see all the bills paid tends to negative the existence of such an agreement; but if it be supposed that an agreement could be implied, an interesting question arises as to its availability to the defendant as a defense to a suit upon the partnership obligation.

By the Civil Code, a release of one of two or more joint obligors is valid as to the one released, but the right of the remaining obligors to contribution from him is not cut off.[14] This rule holds, according to California authority, when the joint obligors are partners, and the obligation is incurred in the course of the partnership business.[15]

Therefore, even without making refined distinctions between a release and an agreement not to sue, it would seem that in a case where as a matter of interpretation the agreement was not merely one as to internal management but was intended to limit the liabilities of the parties to third persons, and where also it would be fair to imply assent to that agreement on the part of third parties, California courts should find no difficulty in relieving the partner who was not to be liable from liability. As pointed out, the principal case comes near to but does not actually present this question.

*A. B. M.*

PRINCIPAL AND AGENT: LIABILITY OF OWNER OF AUTOMOBILE FOR NEGLIGENT DRIVING BY MEMBER OF FAMILY—In the case of *Spence v. Fisher*[1] the court held that a father who is the owner of the family automobile is not liable for the negligent driving of an adult child using the car for her own purposes. This decision

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[11] Burdick on Partnership (3d. ed.) p. 64; Pooley v. Driver (1876) 5 Ch. Div. 458.

[12] Lindley on Partnership (2d. ed.) p. 35; Burdick on Partnership (3d. ed.) p. 18; Dwinel v. Stone (1849) 30 Me. 384; Carlton v. Coffin (1854) 27 Vt. 496.

[13] Burdick on Partnership (3d. ed.) p. 20; Farnum v. Patch (1880) 60 N. H. 294.

[14] Cal. Civ. Code, § 1543.

[15] Northern Ins. Co. v. Potter (1883) 63 Cal. 157.

[1] (Oct. 22, 1920) 60 Cal. Dec. 510, 193 Pac. 255.